No. 01-1385 (A)

APR 19 2002

CLERK

IN THE

Supreme Court of the United States

MARTIN HORN, Commissioner,
Pennsylvania Department of Corrections, et al.,
Petitioners,

vs.

GEORGE E. BANKS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

~~MOTION FOR LEAVE TO FILE AND~~
BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

KENT S. SCHEIDEGGER
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

11 pp

QUESTIONS PRESENTED

1. Under 28 U. S. C. § 2254(d)(1), is a claim that would otherwise be barred by the rule of *Teague* v. *Lane* revived by the state postconviction court's rejection of the claim on the merits rather than on nonretroactivity?

2. Is the rule of *Mills* v. *Maryland* retroactive on habeas to cases that became final before *Mills* was decided?

3. Do the jury instructions, form, and poll used in the present case, taken together, violate the rule of *Mills* as modified by *Boyde* v. *California*?

4. Was the Pennsylvania Supreme Court's negative answer to Question 3 "contrary to or an unreasonable application of" *Mills* and *Boyde*?

IN THE

Supreme Court of the United States

MARTIN HORN, Commissioner,
Pennsylvania Department of Corrections, et al.,
Petitioners,

vs.

GEORGE E. BANKS,
Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The rules of *Teague* v. *Lane* and 28 U. S. C. § 2254(d) are important and independent limitations on collateral review. The Court of Appeals' erroneously narrow interpretation of these rules will needlessly delay enforcement of the death penalty, reducing its deterrent effect. These delays are contrary to the rights of victims and society which CJLF was formed to advance.

April, 2002

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

TABLE OF CONTENTS

Questions presented i

Motion for leave to file iii

Interest of *amicus curiae* iii

Table of authorities vi

Brief of *amicus curiae* 1

Summary of facts and case 1

Summary of argument 2

Argument 3

I

Teague v. *Lane* remains an independent condition on the habeas remedy 3

II

Mills was a new rule and is not retroactive 6

III

The rule of *Mills* requires clarification 6

IV

The Court of Appeals badly misapplied the "unreasonable application" prong of §2254(d)(1), as construed in *Williams* v. *Taylor* 8

Conclusion 10

TABLE OF AUTHORITIES

Cases

Banks v. Horn, 271 F. 3d 527 (CA3 2001) ..... Passim

Banks v. Horn, 63 F. Supp. 2d 525 (MD Pa. 1999) 1

Boyde v. California, 494 U. S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990) 8

Breard v. Greene, 523 U. S. 371, 140 L. Ed. 2d 529, 118 S. Ct. 1352 (1998) 3

Caldwell v. Mississippi, 472 U. S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985) 4

Coleman v. Thompson, 501 U. S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) 5

Collins v. Youngblood, 497 U. S. 37, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990) 5

Commonwealth v. Banks, 656 A. 2d 467 (Pa. 1995) 9

Frey v. Fulcomer, 132 F. 3d 916 (CA3 1997) 7

Harris v. Reed, 489 U. S. 255, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989) 5

Lambrix v. Singletary, 520 U. S. 518, 137 L. Ed. 2d 771, 117 S. Ct. 1517 (1997) 5

McKoy v. North Carolina, 494 U. S. 433, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (1990) 7

Mills v. Maryland, 486 U. S. 367, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988) 1, 6, 8, 9

Penry v. Johnson, 532 U. S. 782, 150 L. Ed. 2d 9, 121 S. Ct. 1910 (2001) 9

Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) 5

Sawyer v. Maggio, 479 So. 2d 360 (La. 1985) 4

Sawyer v. Smith, 497 U. S. 227, 111 L. Ed. 2d 193, 110 S. Ct. 2822 (1990) 4, 5

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) 3

Tyler v. Cain, 533 U. S. 656, 150 L. Ed. 2d 632, 121 S. Ct. 2478 (2001) 4

Williams v. Taylor, 529 U. S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000) 3, 8, 9

United States Statutes

28 U. S. C. § 2244(b)(2)(A) 4

28 U. S. C. § 2254(d)(1) 8

Rule of Court

Supreme Court Rule 10(a) 9

Miscellaneous

Liebman & Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 Colum. L. Rev. 696 (1998) 3

Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998) 3

IN THE

Supreme Court of the United States

MARTIN HORN, Commissioner,
Pennsylvania Department of Corrections, et al.,
Petitioners,

vs.

GEORGE E. BANKS,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Over twenty years ago, George Banks murdered thirteen people and wounded a fourteenth. *Banks* v. *Horn*, 271 F. 3d 527, 530, 531 (CA3 2001). The dead included seven children. Pet. for Cert. 2. He was sentenced to death in 1983. *Id.*, at 3. Despite the absence of any doubt regarding his identity as the perpetrator, the execution of the judgment has been delayed for nearly two decades of repetitive review, including a direct appeal, two state collateral reviews, two federal habeas petitions, and associated appeals and petitions for certiorari. See *Banks* v. *Horn*, 63 F. Supp. 2d 525, 530-531 (MD Pa. 1999).

In the most recent round, the United States Court of Appeals for the Third Circuit denied most of his claims, but it vacated the death sentence based on its disagreement with the Pennsylvania Supreme Court regarding the application of *Mills*

v. *Maryland*, 486 U. S. 367 (1988), a precedent established after Banks' sentence became final on direct review. See 271 F. 3d, at 540-541. Both sides have filed petitions for writs of certiorari in this Court. Banks' petition is *Banks* v. *Horn*, No. 01-8875.

SUMMARY OF ARGUMENT

The nonretroactivity rule of *Teague* v. *Lane* and the "deference" standard of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) are independent limitations on collateral attack on state judgments. The Court of Appeals' unexplained assumption that the AEDPA renders *Teague* inapplicable is serious error, warranting correction by this Court.

The question of whether *Mills* v. *Maryland* is retroactive to cases on collateral review is an important question on which there is a deep diversion of authority, making the issue appropriate for this Court's review.

Mills is violated only if the instructions permit one or more jurors to veto mitigating circumstances found by the others. A requirement that jurors continue deliberating until they are unanimous or report deadlock does not violate *Mills*. The failure of the Court of Appeals to recognize this distinction led it to an erroneous conclusion in the present case. The proper scope of *Mills* requires clarification.

The Court of Appeals cited *Williams* v. *Taylor* for the proposition that the "independent judgment" rule survives the AEDPA, a proposition squarely and emphatically rejected by the *Williams* majority. This is an egregious violation of the standard established by Congress, as interpreted in a major precedent of this Court, and warrants this Court's intervention.

ARGUMENT

I. *Teague* v. *Lane* remains an independent condition on the habeas remedy.

Williams v. *Taylor*, 529 U. S. 362, 412 (2000) recognized that "§ 2254(d)(1) places a *new constraint* on the power of a federal habeas court to grant a[n] . . . application . . . ." (Emphasis added). Not a word in the text or history of this statute indicates any intent on the part of Congress to abrogate any of the old constraints. The whole purpose was to give the final judgments of state courts greater effect, not less. See *id.*, at 404.

In the present case, the Court of Appeals simply states as an *ipse dixit* that when the state court rejects a claim by distinguishing the new precedent, rather than on its nonretroactivity, "*Teague* is not implicated." *Banks* v. *Horn*, 271 F. 3d 527, 543 (CA3 2001). The opinion is devoid of any explanation for the conclusion that § 2254(d)(1) applies in place of the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), rather than in addition to it.

Despite the considerable overlap between *Teague* and § 2254(d), *Teague* survives as an independent limitation on the habeas remedy. Some early post-AEDPA writings of the opponents of habeas reform postulated that *Teague* had been supplanted. See, *e.g.*, Liebman & Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 Colum. L. Rev. 696, 866 (1998). That was wishful thinking on their part. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 959, n. 500 (1998). This Court quickly resolved that *Teague* remains in force in the case of a defaulted claim not addressed on the merits in state court. See *Breard* v. *Greene*, 523 U. S. 371, 376-377 (1998) (*per curiam*).

The text of the AEDPA quite clearly implies that the law of retroactivity remains intact. The new statutory successive petition rule makes an exception when "the claim relies on a

new rule of constitutional law, made retroactive to cases on collateral review . . . ." 28 U. S. C. § 2244(b)(2)(A). In order for this statute to operate, this Court must decide the retroactivity of a new rule by deciding collateral review cases. See *Tyler* v. *Cain*, 533 U. S. 656, 663 (2001). This mechanism contemplates that the Court will decide the retroactivity of a rule as a general matter, and not just with reference to one particular state-court decision. The standard for making a new rule retroactive on collateral review remains the *Teague* standard. See *id.*, at 665.

In addition to the defaulted claim and successive petition scenarios, *Teague* remains independently relevant when the claim is first raised on state collateral review. In habeas cases, it is not unusual for the state to defend the judgment both on the ground that petitioner invokes a new rule created after his conviction became final and on the ground that his case is distinguishable from the precedent creating that rule. *Sawyer* v. *Smith*, 497 U. S. 227 (1990) illustrates this situation. Sawyer claimed a violation of the rule of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). *Sawyer*, *supra*, at 232. Before *Teague*, the District Court and a Court of Appeals panel denied relief on the ground that Sawyer's case was distinguishable from *Caldwell*. See *ibid.* After *Teague*, the Court of Appeals en banc and this Court affirmed on the basis of nonretroactivity of *Caldwell*. See *id.*, at 233, 245.

In *Sawyer*, the state court had also rejected the *Caldwell* claim on the merits on state collateral review, after the *Caldwell* decision. Sawyer's conviction became final April 2, 1984. He then filed his state habeas petition, including "a claim that was soon to be known as a '*Caldwell*' claim." Pet. for Cert. in *Sawyer* v. *Smith*, No. 89-5809, p. 5. The Louisiana Supreme Court summarily denied it on December 13, 1985, six months after *Caldwell*. *Sawyer* v. *Maggio*, 479 So. 2d 360 (La. 1985). The fact that the state court had rejected the claim on the merits had no relevance to the pre-AEDPA *Teague* analysis. *Sawyer* did not mention it after the initial summary of the case section.

Regardless of what the state courts had done with the claim, a federal habeas court could not grant relief under a new rule established after the conviction became final. *Sawyer*, 497 U. S., at 245.

Before the AEDPA, then, Banks' *Mills* claim would have been *Teague*-barred. Under *Breard*, if the state collateral review court had invoked a rule that jury instruction claims must be raised on appeal, then the claim would be both defaulted and *Teague*-barred, after the AEDPA as well as before. A state court's decision to rule on the merits rather than default does waive the default, but only because the default rule is based on the doctrine of adequate and independent state grounds. See *Harris* v. *Reed*, 489 U. S. 255, 261-262 (1989). That rationale does not apply to the retroactivity context. Before the AEDPA, a state court ruling on the merits, rather than retroactivity, did not revive an otherwise *Teague*-barred claim. There is no reason why it should now.

Retroactivity is not jurisdictional. See *Collins* v. *Youngblood*, 497 U. S. 37. 41 (1990). In some cases, there may be considerable judicial efficiency in skipping the normal order of decision, if a claim is more easily and obviously deniable on one ground than on another. See *Lambrix* v. *Singletary*, 520 U. S. 518, 525 (1997). When a precedent which is binding on the court that decides the claim establishes that the claim is meritless, simply relying on the precedent obviates the need to analyze other issues. Such efficiency is one of the reasons for adhering to precedent. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854 (1992). The state court's choice of this route should not impose upon the people of the state the burden of relitigating in federal court a claim that would otherwise be *Teague*-barred. The state, not the state court, pays the price for relitigating a claim that should have been barred. See *Coleman* v. *Thompson*, 501 U. S. 722, 738-739 (1991). The state's interest in finality is not diminished by the manner in which the state court disposes of the claim, and the state should not be penalized for it. See *ibid.*

Certiorari should be granted in this case to clarify that when Congress created a "new constraint" in § 2254(d)(1), it did not remove or replace any of the old constraints. The *Teague* rule continues to apply with its full, independent force.

II. *Mills* was a new rule and is not retroactive.

Petitioner has already demonstrated the deep split among the circuits on the question of whether *Mills* v. *Maryland*, 486 U. S. 367 (1988) is a new rule and whether it is retroactive despite its newness. See Pet. for Cert. 13-19. The widespread nature of the problem is amply demonstrated by the number of courts that have addressed it. Little more need be said at this stage. The breadth of the rule, the importance of the issue, and the depth of the split make the case "certworthy."

III. The rule of *Mills* requires clarification.

The Court of Appeals apparently understood the rule of *Mills* to be that jury instructions violate the Constitution if "a reasonable jury could have concluded from the instruction that unanimity was required to find a mitigating circumstance." *Banks* v. *Horn*, 271 F. 3d 527, 546 (CA3 2001). Greater depth of analysis is required.

The problem in *Mills* was the possibility that the jury could have understood its instructions to require it to give no effect whatsoever to any mitigating circumstance on which the jury was divided, and they must proceed to the final decision on the assumption that circumstance was not true. That is not the same as a general prohibition on any unanimity requirement. See *Mills* v. *Maryland*, 486 U. S. 367, 375 (1988). When the jury is not unanimous upon its initial consideration of a mitigating circumstance, there are four possible modes of proceeding:

1. Each juror should proceed to the final decision considering the circumstance if he or she has individually found it true.

2. All jurors should proceed on the premise the circumstance is true.

3. All jurors should proceed on the premise the circumstance is false.

4. The jurors should continue deliberating until they are unanimous, and if they cannot agree report deadlock to the judge, *i.e.*, exactly the procedure they just finished following for the guilt verdict.

Only number 3 violates the rule of *Mills*. Nothing in *Mills* or *McKoy* v. *North Carolina*, 494 U. S. 433 (1990) forbids a state from requiring a jury to continue deliberating until it is unanimous one way or the other. The assumption that *Mills* forbids any kind of unanimity requirement is too simplistic. *Mills* forbids a state from giving any number of jurors less than unanimous the power to block the others from considering a circumstance they believe is true. The Court of Appeals' analysis completely ignores this distinction.

The instructions in the present case included a sentence not found in the instructions in *Frey* v. *Fulcomer*, 132 F. 3d 916 (CA3 1997): "If, after conscientious and thorough deliberations, you are unable to agree on your findings and your verdict, you should report that to me." *Banks*, 271 F. 3d, at 547. This sentence indicates interpretation 4 above, continue deliberating until unanimous or report deadlock. It flatly contradicts interpretation 3, the *Mills* violation. Yet the Court of Appeals, in apparent reference to this sentence, finds it "even more egregious than in *Frey* regarding the need for the jurors to 'agree' on their 'findings.' " *Id.*, at 548, n. 23.

There is nothing "egregious" or even erroneous about requiring jurors to deliberate until they are unanimous. Such a procedure is entirely in accord with the Anglo-American jury tradition. That was how the dissent understood the instructions

in *Mills*. 486 U. S., at 391-393 (Rehnquist, C.J., dissenting). The majority did not dispute that such a procedure would be constitutional; the holding is based entirely on the possibility of a different interpretation. See *id.*, at 378, and n. 11, 383.

The instructions in this case violate the rule of *Mills* only if the possibility of interpretation 3, as distinct from interpretation 4, reaches the "reasonable likelihood" threshold of *Boyde* v. *California*, 494 U. S. 370, 380 (1990). The Court of Appeals not only failed to appreciate the distinction, it placed an important sentence on the wrong side of the balance. This error makes evident the need for further clarification of exactly what *Mills* prohibits and what it allows.

IV. The Court of Appeals badly misapplied the "unreasonable application" prong of § 2254(d)(1), as construed in *Williams* v. *Taylor*.

The Court of Appeals' opinion in this case contains a disturbing statement regarding the application of 28 U. S. C. § 2254(d)(1). It says,

> "the United States Supreme Court has made it clear that a federal court must apply independent judgment in its interpretation of federal law and if, 'after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody . . . violates the Constitution, that independent judgment should prevail.' " *Banks* v. *Horn*, 271 F. 3d, at 542, n. 15 (quoting *Williams* v. *Taylor*, 529 U. S. 362, 389 (2000)).

There is one major problem with this quote. It is not from the opinion of the Court in *Williams*. It is from part II of Justice Stevens' opinion, which is, in effect, a dissent on this point. The opinion of the Court on this point is part II of Justice O'Connor's opinion, which emphatically rejects this passage. See *Williams*, 529 U. S., at 403. For the Court of Appeals to

cite a major precedent of this Court for exactly the opposite of its actual holding is unsettling, to put it mildly.

The Court of Appeals' fundamental misunderstanding of the role of the habeas court under the new regime of the AEDPA is evident in its dismissive treatment of the Pennsylvania Supreme Court's application of *Mills* to the facts of the present case. Changing the rules for reviewing the state court's application of the law to the facts was a central theme of the proponents of this legislation. See *Williams*, *supra*, at 408, n. *.

The state court believed that the jury poll in the present case was significant and devoted considerable attention to it. See *Commonwealth* v. *Banks*, 656 A. 2d 467, 470-472 (Pa. 1995). The Court of Appeals gives us only its cursory conclusion that "the polling does not appear either to add to or reduce the confusion . . . ." *Banks*, 271 F. 3d, at 551. This is completely inadequate for declaring the decision of the state's highest court to be "unreasonable." The jury poll is a major difference between this case and *Mills*. In *Mills*, there was "*no* extrinsic evidence of what the jury in this case actually thought." 486 U. S., at 381 (emphasis added). In the present case, each individual juror was polled regarding his or her agreement with the findings on mitigating circumstances. See 656 A. 2d, at 471.

The jury poll, in addition to the differences in the instructions, makes this case substantially different from *Mills*. Cf. *Penry* v. *Johnson*, 532 U. S. 782, 795 (2001) (substantial differences from controlling precedent sufficient to make state decision a reasonable application). By failing to recognize the differences and their significance, the Court of Appeals failed to give the state court's decision the deference it was due under the AEDPA. This is exactly what Congress intended to stop. It is a dramatic departure from the Congressionally mandated course of judicial proceedings, calling for this Court's intervention. See Supreme Court Rule 10(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

April, 2002

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation